No. 12916.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE TEXAS COMPANY, a corporation,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S BRIEF.

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Statement as to Jurisdiction.

This is an appeal upon a petition filed pursuant to Section 10(f) of the National Labor Relations Act, as amended,[1] herein called the "Act," for review and to set aside an order of the National Labor Relations Board, herein called the "Board," in Case No. 21-CA-375, one of two cases consolidated by the Board for hearing.

Upon a charge [R. 1] filed by George Cody, an individual, the General Counsel of the Board issued a complaint [R. 4] against The Texas Company, herein called the "Petitioner," and a hearing was held thereon before a duly designated Trial Examiner of the Board [R. 76]. The Board dismissed the complaint in its entirety except as it related to Cody [R. 42].

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[1]June 23, 1947, Chap. 120, 61 Stat. 136; 29 U. S. C. A., Sec. 151, *et seq.*

As to Cody, the complaint alleged that the Petitioner had violated Sections 8(a) (1) and (3) of the Act because [R. 8]:

> "7. On or about November 16, 1948, and thereafter, George Cody was on his application refused employment by Respondent [Petitioner herein] because of his concerted activities on behalf of the Union."

The Petitioner filed an answer to the complaint [R. 9] and a motion to dismiss [R. 14, 18]. The Trial Examiner issued an intermediate report [R. 59] finding that [R. 75]:

> "The Respondent [Petitioner herein] did not discriminatorily refuse to employ George Cody to discourage membership in a labor organization."

The Board overruled the Trial Examiner and by its decision and order found [R. 31, 49] that the Petitioner violated Sections 8(a) (1) and (3) of the Act, two members of the five-member Board dissenting [R. 54].

The Petitioner petitioned this Court to review and to set aside the decision and order of the Board in the Cody case [R. 393]. The Board answered the petition and requested enforcement of its decision and order [R. 400]. The Petitioner stated the points upon which it intends to rely on this appeal [R. 406].

The Petitioner is a corporation of the State of Delaware with its headquarters in New York City, and is engaged in the production, manufacture, marketing and distribution of petroleum products throughout the United States. It does business in the State of California, and the alleged unfair labor practice occurred near Los Angeles, California [R. 5, 6, 9, 64, 65]. The order of the

Board [R. 50, 51] is a final order of that agency directed to the Petitioner who is aggrieved by this order.

The petition in this case was filed pursuant to and the Court has jurisdiction to review the order under Section 10(f) of the Act. The review of this case is governed by that section of said Act and by the Administrative Procedure Act.[2]

Statement of the Case.

The issue in this case is whether the Petitioner is obligated under the Act to re-employ as a rank-and-file employee George Cody, its former supervisory employee, who was discharged because as a supervisor he had refused to do a part of the work assigned to him during a strike by the Petitioner's rank-and-file employees, and who was thereafter denied re-employment for the same reason.

The Petitioner operates a refinery at Los Angeles, California, and a Pipe Line Division, both of which are administered by its Refining Department, and is engaged in the production of crude oil in the vicinity of Los Angeles and other parts of California [R. 59, 64, 65, 136, 237-245]. The Oil Workers' International Union and its Local 128, hereinafter called the "Union," at various times have represented groups of the Petitioner's employees in the Los Angeles Area since 1938. During the ten years prior to September, 1948, Petitioner had amicable relations with the Union [R. 38, Note 12].

On September 4, 1948, the Union called a strike against the Petitioner and other oil companies on the west coast [R. 6, 8, 33, 39, Note 15, 236]. While certain unfair labor practice charges arising out of the strike were filed against the Petitioner, the Board held that it was and remained an economic strike from the beginning

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[2]June 11, 1946, Chap. 324, 60 Stat. 237; 5 U. S. C. A., Sec. 1001, *et seq.*

until the end in November, 1948 [R. 41]; and the Petitioner was held by the Board not to have engaged in any unfair labor practices except with respect to the special case of George Cody [R. 38, Note 11, 40, 51]. The Board noted the absence of earlier unfair labor practice charges against the Petitioner and found that the Petitioner did not have any anti-union animus at any time during its dealings with the Union [R. 38]. Moreover, it should be noted that all disputes growing out of the strike were amicably settled by the Petitioner and the Union for the employees of the Refining Department, where Cody was employed [R. 65, 78-79, 81, 99, 105, 241-243].

George Cody was employed by the Petitioner as a laborer in April, 1928 [R. 65, 91]; he rose to higher and higher nonsupervisory jobs until he was promoted to assistant district foreman in the Refining Department, Pipe Line Division, in February, 1948 [R. 65, 96]. With knowledge that the law made union activity and supervisory work inconsistent, Cody obtained a withdrawal card from the Union [R. 170]. Cody was a supervisor within the meaning of the Act and as such was excluded from its coverage when he was discharged on September 28, 1948 [R. 46, 65, 82].

During the time that Cody was a nonsupervisory employee, he was active in the Union, was a member of various Union committees, negotiated with the Petitioner concerning collective bargaining contracts, and obtained several leaves of absence from the Petitioner to engage in Union business [R. 66, 99-101, 112, 172, 209]. Cody was interested in Union matters as early as 1934, and was told that Petitioner had no objections to employees belonging to a union even before the Wagner Act[3] became

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[3]July 5, 1935, Chap. 372, 49 Stat. 449.

law [R. 100]. Cody was promoted to a supervisory job strictly because of his ability. and was told at the time that union activity did not influence the choice of employees for promotion [R. 170-171].

The 1948 strike was about 10 days old when Cody returned from his vacation and commenced work [R. 97]. Beginning on September 13 and until he was discharged on September 28, Cody patrolled the Petitioner's pipe lines and reported on various conditions prevailing at the property [R. 107]. This was work normally done by line riders, gaugers, and pumpers, nonsupervisory employees included in the bargaining unit, and some of whom were normally supervised by Cody [R. 105-107, 133, 175, 176, 240]. Cody's normal job was the supervising of certain employees engaged in operating the Petitioner's pipe lines which transported crude oil from one place to another in the Petitioner's pipe-line system [R. 81, 82, 133, 240].

The Petitioner operated these pipe lines during the strike to the knowledge of Cody, who continued to work in patrolling the pipe lines [R. 131-133, 137, 247, 251-252, 278-279, 298-316, 381]. On September 21 Cody declined to deliver some "strappings," a type of table used in measuring the capacity of the Petitioner's oil tanks; the next day he declined to deliver "run tickets," a type of report showing the movement of oil in the Petitioner's pipe lines [R. 67, 107, 179-183, 195-196]. No order was given directly to Cody to deliver these reports, but he declined because he did not want to do certain things deemed by him to be direct participation in operations [R. 68, 195-196]. During this time, however, he continued to work in patrolling the pipe lines [R. 228].

On September 28 Cody was told by his supervisor to go to one of the Petitioner's pumping stations and gauge and sample the oil tanks [R. 108, 187, 318]. Cody ex-

plained that he didn't want to do this; but he offered to drive another individual to the pumping station so that the latter might perform this work [R. 108-111, 189-190]. Cody finally compelled his superior to give the "order," after which he refused to do the work [R. 110, 195]. For this reason he was discharged [R. 110-111, 188-189, 318].

Cody refused to do some of the work assigned to him because of his personal feelings developed during his past experiences in union work and because of his fear for his family [R. 108, 197], but he was willing to do other work assigned to him [R. 110, 194]. Subjectively, Cody did not want to side either with the Petitioner or with the Union in the economic struggle of the strike. He expressed the desire to be "on a team of my [Cody's] own" [R. 319].

After he was discharged, Cody applied at various times for re-employment by the Petitioner. Up until November 16, 1948, he applied for his former job as assistant foreman, but on and after that date he asked for "any job" [R. 153-154]. In all cases he applied for reinstatement with credit for his past service with the Petitioner [R. 160, 167, 200, 202, 323, 325, 328]. Cody was denied re-employment because he had refused as a supervisor to do part of the work assigned to him during the strike [R. 43-44, 54, 74, 148-149, 321, 332]. As his superior, Superintendent Dreyer told Cody his refusal to work was "premeditated" and rank insubordination [R. 200, 330]. Even after the strike was over, Cody was still unwilling to do the work that might be required of a supervisor during a strike [R. 148, 149, 321, 323, 352]. Cody apolo-

gized [R. 43, 152, 205, 323], but he was still unwilling to be on management's "team."

The Petitioner does not have a practice of downgrading to their former positions employees who were *unsatisfactory* as supervisors.

The Petitioner did not refuse Cody re-employment for the purpose of discouraging rank-and-file union activity [R. 47, 55, 74].

Specification of Errors.

1. The Board erred in its conclusion that Cody applied for work as a new employee because there is no finding that he did not seek reinstatement with seniority credits.

2. The Board erred in its conclusion that the 1947 Amendments to the Act "were not intended to change the character of union or other concerted activity engaged in by supervisors" [R. 44].

3. The Board erred in its conclusion that the exclusion of supervisors from the protection of the Act was partial instead of complete and by disregarding the Congressional intent.

4. The Board erred in its conclusion that the limitations as to supervisors' union activities imposed by the Act are of a "special character" [R. 47].

5. The Board erred in its conclusion that Cody became an "employee" after he was discharged so as to enjoy the protection of the Act.

6. The Board erred in its conclusion that Cody's activity would have been protected if he had been an "employee" at the time of his discharge.

7. The Board erred in its inference that the refusal to re-employ Cody "necessarily discouraged" membership and concerted activity in the Union [R. 49].

8. The Board erred in its finding and conclusion that Cody "made common cause" with rank-and-file employees [R. 48] and that he acted "in aid" of the rank-and-file employees [R. 49].

9. The Board erred in its failure to give appropriate consideration to the absence of any motive by Petitioner to interfere with and discourage rank-and-file union activity [R. 47] and by the lack of anti-union animus on the part of Petitioner [R. 38].

10. The Board erred in its finding that Petitioner "made a practice of downgrading to their former positions those who were unsatisfactory as supervisors" [R. 49, Note 33], and in its conclusions drawn from this unsupported finding.

11. The Board erred in ordering Petitioner to cease and desist from discouraging membership in the Oil Worker's International Union and its Locals 120 and 128, and to post notices in that regard, in that there is no evidence or other basis for an inference that membership in these locals was or might reasonably be calculated to be discouraged.

12. The Board erred in ordering Petitioner to employ Cody and to pay him back pay because of the prohibitions in Section 10(c) of the Act against such for individuals discharged or suspended "for cause".

13. The Board erred in its conclusion that the only concerted or union activity which is not "protected" is that which is "tainted with illegality" [R. 45].

14. The Board erred in its finding and conclusion that the cause for the refusal to rehire Cody was "protected" by the Act.

15. The Board erred in giving *ex post facto* effect to the Act's protection features.

Summary of the Argument.

I.

The Board's interpretation of the Act, is contrary to the specific provisions of the Act, and contravenes the Congressional intent to disenfranchise supervisors and wholly remove them from any protection of the Act. The Board has attempted to do by indirection that which it is precluded from doing directly.

II.

Cody did not engage in concerted activity within the meaning of Section 7 of the Act; nor did he make "common cause" with the striking employees. Cody's activity was not for "mutual aid or protection," and such is precluded because of the inherent disparity of interest as to supervisors and "employees."

III.

The refusal by the Petitioner to employ Cody did not, nor could it be inferred that it would, discourage membership of employees in a labor organization within the meaning of Section 8(a) (3) of the Act; the only union or concerted activity that conceivably could be discouraged is that of supervisors and that is permissible under the Act.

IV.

Cody was discharged "for cause" within the meaning of the Act; he was refused employment for a "cause" which was a "permissible criterion" for such refusal within the meaning of the Act. The activity was "unprotected" at the time it occurred and it cannot be retroactively converted into "protected" activity.

ARGUMENT.

POINT I.

The Board's Order Is Contrary to the Provisions and Purposes of the Act.

At the outset we should note that everything material to the alleged unfair labor practice in this case occurred after the present Act became effective on August 22, 1947. Certain references to the Act's predecessor,[4] herein called the "Wagner Act," are made in our arguments because the Board has rested its decision, conclusions, and findings upon cases decided and doctrines enunciated under the Wagner Act. Nevertheless, the fact remains that the conduct of Petitioner must be measured in terms of the Act as it now exists and did exist when the conduct complained of occurred. Our references to the earlier law are made, therefore, merely to complete our arguments that the Board's holdings are wholly unsupported by law and evidence.

A. The Decision and Order Repudiates the Congressional Intent.

This case is one wherein the Board has substituted its judgment for that of Congress and has legislated under the guise of administration. Although the Board should know full well that Congress, when it amended Section 2 (3) of the Act in 1947, laid to rest the dispute over the status of supervisors, it has, nevertheless, played "fast and loose" with the will of Congress in the instant case, as illustrated by the following examples:

(1) It employs such vague and confusing phrases as ". . . these amendments . . . were not intended to

[4]See Note 3, *supra.*

change the character of union or other concerted activity engaged in by supervisors" [R. 44];

(2) It clings to its Wagner Act philosophy that supervisors are half master and half servant [R. 45, Note 26];

(3) It coins previously unheard-of terms and phrases such as ". . . special character of the limitations on union activity by supervisors" [R. 47];

(4) It gives the statute an *ex post facto* application [R. 46, Note 28];

(5) It reaches meaningless and unexplained conclusions that Cody made "common cause" [R. 48] with and that his activity was "in aid" of "the very rank-and-file employees whose number he was later prevented from joining . . ." [R. 49];

(6) It concludes that a "non-employee" engaged in "concerted activity" with "employees" despite the Act's clear separation of the interests of the two;

(7) It rules that Congress intended that an employer could discriminate against a supervisor in certain respects only, but gives no reason or logic to support its belief [R. 49].

The Board in this case has disregarded, without explanation, its own and court decisions, as well as the clear language of the Act and its voluminous legislative history.[5]

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[5]*DiGiorgio Fruit Corporation v. N.L.R.B.*, C. A. D. C., June 21, 1951, No. 10605, ... F. 2d ....., 28 Labor Relations Reference Manual (BNA) 2195; *N.L.R.B. v. Edward G. Budd Mfg. Co.* (C. A. 6, 1948), 169 F. 2d 571; *Alabama Marble Company* (1949), 83 NLRB 1047; *Lily Tulip Cup Corporation* (1950), 88 NLRB 892; *Pacific Gamble-Robinson Company* (1950), 88 NLRB 482; *Accurate Threaded Products Company* (1950), 90 NLRB 1364; *Palmer Manufacturing Company* (1951), 94 NLRB No. 230; *Tri-Pak Machinery Service, Inc.* (1951), 94 NLRB No. 244.

In considering the effect of the changed definition of "employee" in the Act, we shall refer rather extensively to the Congressional reports and debates, because the Board has so blythely ignored the clear and unmistakable exclusion of supervisors as a class from all protection of the Act. Since the Board would obscure this specific exclusion with fancy phrases, it becomes necessary that we examine carefully what Congress intended.

The exclusion of supervisors from the "employee" class originated in the House of Representatives (H. R. 3020, 80th Congress, 1st Session) and the Committee Report[6] noted some historical developments on the subject which prompted the legislation including the following: (pp. 13-14):

> ". . . The bill, by excluding foremen and other supervisory personnel from the definition of 'employee,' deprives the Board of jurisdiction over them.
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> * * * * * * * *
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> "When Congress passed the Labor Act, we were concerned, as we said in its preamble, with the welfare of 'workers' and 'wage earners,' not of the boss. It was to protect workers and their unions against foremen, not to unionize foremen, that Congress passed the act.
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> * * * * * * * *
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> "In deciding the Maryland Drydock case, the Board pointed out that unionizing foremen under the Labor Act would be bad for output, which the act was intended to promote, bad for the rank and file, and bad for the foremen themselves. . . . Then,

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[6]House of Representatives Report No. 245, 80th Congress, 1st Session. See also Senate Report No. 105, on S. 1126, 80th Congress, 1st Session, pages 3-4, to the same effect.

in *Matter of Packard Motor Car Company* (61 N. L. R. B. 4 (1945)), the Board changed its mind again, . . . As a result of the Board's ruling in the Packard case, both Houses of Congress, by overwhelming majorities, passed the so-called Case bill, exempting supervisors from the operation of the Labor Act. The President vetoed the bill, and the Board continued to unionize foremen at an accelerated pace."

The Senate Report[6] states:

"In recommending the adoption of this amendment, the committee is trying to make clear what Congress attempted to demonstrate last year when it adopted the Case bill [to exempt supervisors from the operation of the Labor Act]. By drawing a more definite line between management and labor we believe the proposed language has fully met some of the technical criticisms to the corresponding section referred to in the President's veto of that bill."

The House Committee Report, *supra*, indicated how thoroughly the Committee had studied the question of supervisors' status under the Act, and how completely incompatible with the purposes of the law was union activity by supervisors. The report stated on page 14:

"It [unionizing supervisors] is inconsistent with the policy of Congress to assure to workers freedom from domination or control by their supervisors in their organizing and bargaining activities. It is inconsistent with our policy to protect the rights of employers; they, as well as workers, are entitled to loyal representatives in the plants. . ."

The Board said in its decision "the Trial Examiner has misconceived the effect of the 1947 amendments which removed supervisors from the protection which the Act

accords employees" [R. 44]. We submit that the following analysis makes clear that it is the majority members of the Board in this case who have the misconception.

The Board said that these amendments "were not intended to change the character of union activity or other concerted activity engaged in by supervisors" [R. 44]. And, without explanation or support, concluded that there is some kind of "special character of the limitations on union activity by supervisors" [R. 47].

From what and how the Board reached these conclusions, as well as what they mean, remains a mystery! Further reference to the legislative history on this subject reveals that the Board is clearly in error. Congress intended to and did *completely* "change the character" of union activity by supervisors under the Act. Their exclusion was intended to be and is *complete,* witness a statement by Senator Taft, co-author of the legislation:[7]

> "The bill provides that foremen shall not be considered employees under the National Labor Relations Act. They may form unions if they please, or join unions, but they do not have the protection of the National Labor Relations Act. They are subject to discharge for union activity, and they are generally restored to the basis which they enjoyed before the passage of the Wagner Act.
>
> "It is felt very strongly by management that foremen are part of management; that it is impossible to manage a plant unless the foremen are wholly loyal to the management. We tried various in-between steps, but the general conclusion was that they must either be a part of management or a part of the employees. It was proposed that there be separate fore-

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[7]Congressional Record, April 23, 1947, 93 Cong. Rec. 3952.

> men's unions not affiliated with the men's unions, but it was found that that was almost impossible; that there was always an affiliation of some sort; that foremen, in order to be successful in a strike, must have the support of the employees' union. A plant can promote other men to be foremen if necessary. The tie-up with the employees is inevitable. The committee felt that foremen either had to be a part of management and not have any rights under the Wagner Act, or be treated entirely as employees, and it was felt that the latter course would result in the complete disruption of discipline and productivity in the factories of the United States."

We submit there are no words in the English language that could make this point clearer. Senator Taft said in the statement above that foremen would be "restored to the basis . . . enjoyed before the passage of the Wagner Act." That is complete and thorough exclusion! There were *no* protections as to union activity before, during, or after employment, prior to the Wagner Act.[8] So it is today as to supervisors.

The Board just has nothing to lean upon to support its statement that the law doesn't "change the character" of supervisors' activities. Frankly, we are at a loss to understand what the Board had in mind. But we do know that Congress clearly intended that the Board could not order a discharged foreman re-employed. The Board's approach

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[8]*N.L.R.B. v. Edward G. Budd Manufacturing Co., supra,* at page 577, the court said: "But prior to the National Labor Relations Act no federal law prevented *employers* from discharging employees for exercising these rights or from refusing to recognize or bargain with labor organizations. The National Labor Relations Act created rights *against employers* which did not exist before."

in this decision is that it can do *indirectly* that which the law prohibits it from doing *directly*.

Some members of the Senate tried to write the supervisors' exclusion in an "in-between" fashion, but, as noted in Senator Taft's statement above, the authors of the Act concluded that the supervisors "either had to be a part of management and *not have any rights* . . . or be treated entirely as employees." (Emphasis added.)[9] Congress decided to give them no rights, and the Board has no authority to change that decision.

Senator Smith of New Jersey, a member of the Senate Labor Committee which considered this legislation, said on the Senate floor on April 30, 1947, during debates on this law (93 Cong. Rec. 4411):

> "It [the definition of supervisor] recognizes a supervisor as representing management, and not representing labor and where the supervisor has to represent management, it seems only proper that he should not be in the category of being union-minded because unfortunately controversies between management and the unions do occur."

But, the Board orders Cody re-employed because it believes he was "union-minded." It wants to force the Petitioner here to re-employ Cody because it *thinks* he made "common cause" with "employees." Yet, the Board admits that he could be discharged because of what he did.

Senator Flanders, of Vermont, author of a part of Section 2 (11) of the Act containing the definition of

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[9]One such "in-between" method was proposed on the floor of the Senate on May 13, 1947, and was rejected (93 Cong. Rec. 5298).

"supervisor,"[10] remarked as follows on the Senate floor on May 7, 1947, in connection with the exclusion of supervisors (93 Cong. Rec. 4804):

> "The reasons [for removing this supervisory force from the area of collective bargaining] are simple and direct. Unless the employer can hire and discharge, promote, demote, and transfer these men, he has lost the control of his business. He cannot run it effectively."

Once again the completeness of the exclusion of supervisors is demonstrated by a statement of one instrumental in writing the law. Not only does it guarantee freedom to *discharge* supervisors, but also it assures the right to *keep* them discharged. Otherwise, the freedom to discharge and the right to demand loyalty are meaningless.

It is obvious, therefore, that the three majority Board members, and not the Trial Examiner and the two dissenting members, have "misconceived the effect of the 1947 Amendments which removed supervisors from the protection which the Act accords to 'employees'" [R. 44].

The above references to the legislative history of the Act constitute unassailable and unmistakable evidence that Congress intended that foremen like Cody could not get any protection from the Act, even by the devious method here employed by the Board. The following statement on page 5 of the Senate Report, *supra,* shows that Congress intended strict administration and not lukewarm application of the exclusion:

> "It is natural to expect that unless this Congress takes action, management will be deprived of the undivided loyalty of its foremen. There is an inherent

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[10]93 Cong. Rec. 4805, May 7, 1947, amendment of Senator from Vermont agreed to.

tendency to subordinate their interests wherever they conflict with those of the rank and file."

Yes, management can now demand "the undivided loyalty of its foremen" under the Act. That is, it can unless the Board is permitted to warp the law as it would do in this decision. The Board dropped the matter of divided loyalties [R. 44] with the casual implication that Congress intended that an employer would be absolved from liability as to supervisors *only* for their discharge and the requirement to bargain. But there is nothing in the law from which the Board may draw such an inference. Moreover, the Congressional reports and debates refute this theory of *partial* exclusion, under which the whole purpose of the amendment would be thwarted. Congress wanted to restore supervisors to their historical position under the common law when they were the "master" and not the "servant." Congress intended supervisors to be a part of management and to give their undivided loyalty to the employer. The Board would, however, "water down" this Congressional mandate by the effect of this decision.

The supervisor amendment was "made to order" for the situation involved in the instant case. The Petitioner was engaged in an economic struggle with the Union,[11] and had resumed some and accelerated other operations for "bona fide business considerations." [R. 38]. Cody, along with other supervisors, all of whom were working

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[11]The strike was and remained an economic strike as distinguished from an unfair labor practice strike [R. 41]. See *Mackay Radio & Telegraph Co.* (1938), 304 U. S. 333, 58 S. Ct. 909, 82 L. Ed. 1381; *N.L.R.B. v. Potlatch Forests, Inc.* (C. A. 9, 1951), 189 F. 2d 82; *Morand Bros. Beverage Co. v. N.L.R.B.*, C. A. 7, July 23, 1951, No. 10335, ... F. 2d ....., 28 Labor Relations Reference Manual (BNA) 2364; *International Shoe Co.* (1951), 93 NLRB 159.

during the strike, was instructed to perform a certain task in connection with this program of accelerated operations [R. 263-264]. But Cody, from whom the Petitioner had a legal right to *demand* "undivided loyalty," decided that he didn't want to do what he was instructed to do. Instead, he wanted to remain in his position of assistant foreman and receive his pay for that job, but he wanted to "haul" another person to do this assignment [R. 109-110, 189]. This was precisely the occasion when the Petitioner *needed* Cody and when he could be compelled to be on management's "team." But when his superior gave him "the order," he refused to obey and he was discharged for this insubordinate action [R. 110-111, 188-189, 318]. The Board held this discharge to be privileged, but, ruled the Board, Petitioner could not thereafter refuse to re-employ him because he had once been insubordinate. Such a ruling is repugnant to the policies, provisions and principles of the Act.

Here is the way such administration of the statute would work under the Board's order: Cody would come to work as a laborer, the lowest classification and the one into which new employees are placed. Immediately he would demand credit for his 20 years' previous service—he said he was trying to protect this service [R. 200, 323, 325, 328]. He would demand credit for his accumulated rights under Petitioner's Pension and Insurance Plan—he never withdrew from this plan [R. 203]. He would insist that his seniority credit entitled him to the highest job in the Pipe Line Division—counsel for the Board argued that Cody should not be treated as a stranger [R. 122, 123]. This would have a disintegrating effect upon the industrial relations of Petitioner. Instead of enabling Petitioner to demand "loyalty" from its supervisors, as the Act intends, the enforcement of this order of the Board would wreck the authority of higher management over lesser supervisors. There would

be no power of effective discipline by which management could enforce a rule of neutrality on union matters among its supervisors.[12] Moreover, Petitioner's effectiveness to operate its business would be seriously deterred.[13] A foreman could engage in and play favorites in union activities, whether it be due to fear or personal principle, knowing that he could always get "a job back"[14] if he should be discharged for his union activity. Thus, the exclusion of supervisors from the Act's protection would be nullified and the Congressional intent defeated.

B. The Board's Findings and Conclusions Are Erroneous as to Downgrading of Supervisors.

The Board erroneously found that Petitioner "made a practice of down grading to their former positions those who were unsatisfactory as supervisors" and cited the *Lily-Tulip Cup* case, *supra* [R. 49, note 33],[15] Since the Board will order a discharged foreman rehired or not. depending upon rules and past practices, it would expect the supervisor to return under and thereafter be governed by rules, labor contracts, practices, etc., just as would one who is ordered reinstated to his original position. In that way the erstwhile foreman would shortly be promoted again to a foreman; if not, the employer would be ordered by the Board to do so because his denial of promotion, so the Board would conclude, was due to his *past* union activities. Such an order by the Board

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[12]*Wells, Inc.* (C. A. 9, 1947), 162 F. 2d 457; *Palmer Manufacturing Corporation, supra; Carnegie-Illinois Steel* (1949), 84 NLRB 851; *Columbia Pictures Corp.* (1951), 94 NLRB No. 72. See, also, Point II, *infra.*

[13]See Note 10, *supra.*

[14]These are the words used by Cody on the witness stand [R. 153, 200, 207].

[15]The lack of evidence for this finding is discussed *infra.*

would be as reasonable and plausible as the one in the instant case. Board Counsel stated that no contention was made that Cody should have been demoted [R. 119], but yet the Board based its order in large part upon this so-called "downgrading" theory. Obviously, the Board is whittling away at the statute in a manner that, if permitted to stand, would surely and shortly render the supervisor exclusion feature of the Act a nullity.

There is no substantial evidence in the record to support the Board's finding that Petitioner had a practice of downgrading [R. 49, Note 33]. Counsel for the Board argued that Petitioner had such a practice [R. 114, 122-123], and on that basis the Trial Examiner admitted into evidence General Counsel's Exhibits 23 and 24 [R. 124, 125]. Board Counsel agreed that Petitioner was not obligated to follow the contracts in question, but he contended that it *did* follow them under identical situations. But not one word of testimony was forthcoming to establish this contention. Therefore, the only possible basis for the Board's finding that such practice prevailed is Board Counsel's statement. The Board certainly cannot rely upon the contract as evidence of this finding—its Counsel (Mr. Hackler) agreed that the contract provisions created no such obligations. His purpose was to lay a foundation by the contracts for later testimony that such provisions were followed as to demoted supervisors. As noted, such evidence did not materialize.

The contract provisions do not support the Board's finding even if they had been offered for that purpose and if Counsel had contended that they do. The contract in evidence as General Counsel's Exhibit No. 23 [R. 125, Sec. M.] provides that "an employe incapable of performing the duties . . ." will have certain rights. So, this could not cover Cody because (1) he was not an "employee," (2) he was not subject to the jurisdiction of or included in the unit described in the contract, and (3)

he was not "incapable of performing the duties"—he just *refused* to perform them. In General Counsel's Exhibit No. 24 [R. 125], Section K must be read in connection with Sections H and M which describe the reasons for which a promotee may be demoted and still keep his seniority. By no stretch of the Board's powers to draw inferences can it conclude that these contracts obligated Petitioner to permit a person who had been discharged for insubordination to retain his seniority, even if its Counsel had so contended. Thus, this finding [R. 49, Note 33] must fall as devoid of *any* supporting evidence; and likewise, the theory of the Board that this non-existent practice would support its conclusions of violations cannot be sustained.

We believe the Board must not have fully and carefully analyzed the ultimate effects of this downgrading theory it seems to be developing. Can it be that the Board is going to permit a discharge of and subsequent refusal to rehire a supervisor *only* if the employer has "no down-grading policy . . . of long standing . . . established prior to the advent of the Union"? *Lily-Tulip* case, *supra,* at page 893. In the latter case the Board held that the "no down-grading" policy "was an operative factor in Young's discharge as a supervisor" and that the discharge was not "violative of the Act." In our case the Board held that Cody's discharge was for his refusal to obey an order and that such was not "violative of the Act." Under the Board's ruling it would appear that Petitioner could refuse to rehire Cody *only* if it had a rule that it would not rehire foremen who were discharged for insubordination. Under no authority of the Act is such required. The Board cannot shift the burden to the employer in such cases to prove that it never rehired a foreman, or that it had such a policy. The law gives the Board no such power. The crux of the issue in a refusal to hire is whether the refusal was for a reason prohibited by the

Act. The Board here agreed that the reason in Cody's case was his disobedience and that the Petitioner was free to discharge him for such disobedience.

In the *Lily-Tulip* case, *supra,* page 893, the Board said ". . . We do not believe that the policy [of no downgrading] was unlawfully invoked to deny reemployment to Young shortly after her proper discharge." The Board has no basis in law or evidence to believe that Petitioner unlawfully invoked its inherent right to refuse in this case to rehire this insubordinate individual. The use of this inherent right could be a violation of the Act only if it was for discrimination under Section 8(a) (3) or interference, restraint, and coercion under Section 8(a) (1). To sustain such a finding, there must be substantial evidence that the normal right to refuse re-employment to Cody was invoked for discriminatory purposes. But the Board did not, nor could it on the record, make such a finding. In fact, the only findings on this question in this case are that Petitioner was not "motivated by a specific purpose to interfere with and discourage rank-and-file union activity" [majority decision, R. 47]; that there was no "anti-union animus" [Board decision, R. 38]; and that membership in and support of the Union played no part in the refusal to rehire Cody [Intermediate Report of Trial Examiner, R. 73]. Counsel for the Board *said* he was going to prove "motive," but he failed to do so [R. 119].

The theories pronounced by the Board in this and the *Lily-Tulip* cases give the appearance of grasping for any expedient to minimize the effect of the supervisor exclusion provision. In the instant case the Board compounds its fallacious reasoning in the *Lily-Tulip* case by holding, without any supporting evidence, that this Petitioner had a practice of downgrading supervisors and, therefore, that

Cody should have been rehired. Although the Petitioner or any other employer might demote a recently promoted supervisor because he could not perform the duties, that is *not* evidence that it would demote the same individual if he had refused to obey orders. Therefore, the rationale by which this downgrading doctrine evolves is thoroughly unsound, impractical, and without legal support.

The Board seems to have entirely ignored Cody's own testimony as to the circumstances surrounding his promotion. Cody was told by his superior at that time that he no doubt understood the law and that he should sever his relations with the Union, after which Cody mentioned that he could obtain a withdrawal card [R. 129, 170]. It was not necessary to tell Cody then that if he refused to obey orders, even during a strike, he would be discharged and refused re-employment. An employer is not required to spell out to those working for him each and every act which constitutes insubordination. It is common knowledge that insubordination is a justifiable cause for discharge and a sufficient ground for refusing re-employment. It is not necessary to have a "practice" of refusing to rehire an insubordinate worker. Cody clearly understood that a foreman was a part of management and had to obey orders even if it meant that he couldn't participate in union affairs. He knew that he could not legally make "common cause" with or "aid" rank-and-file employees in union matters.

The Board's order cannot be supported by the specious reasoning it has used to weave this nebulous "downgrading policy" doctrine.

C. Section 14(a) Does Not Grant Supervisors the Protection of the Act.

The Board mistakenly relies upon Section 14(a)[16] of the Act to convert Cody's admittedly "unprotected" activity into "protected" activity. The Board voids the effect of the exclusion of supervisors from the protection of the Act by reasoning that since it is not *illegal* for a supervisor to be a member of a union, then any activity on behalf of a union or union members is protected. And the Board reasons that the protection attaches only *after* the supervisor has been legitimately discharged. In other words, says the Board, if a supervisor can legally belong to a union, then he is given *ex post facto* protection for his activity even though it was not protected at the time.

Section 14(a) does not afford support for any such fantastic theory. The sole purpose of the opening clause of Section 14(a)[17] of the Act was to make sure that union membership by a supervisor was not made a violation of the Act. Congress had gone so far in completely excluding supervisors, and so much had been said about supervisors being a part of management, that this clause was inserted so as to avoid any construction of the Act in a manner that would make *mere membership* a violation of the law. The report of the Senate Committee of Labor and Public Welfare [18] made this clear (page 28):

> "Section 14: This is a new section which makes it clear that the amendments to the act do not prohibit supervisors from joining unions, but that it is contrary to national policy for other Federal or State

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[16]The decision erroneously cited this as "Section 1(a)" [R. 46].

[17]The opening clause of Section 14(a) of the Act reads, "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization. . . ."

[18]Senate Report No. 105, 80th Congress, 1st Session, on S. 1126.

> agencies to compel employers who are subject to the National Board to treat supervisors as employees for the purpose of collective bargaining or organizational activity."

The Conference Report[19] from the House and Senate Conferees noted the following with respect to the effect of this clause (page 60):

> "Section 14 of the Senate amendment contained a provision to the effect that nothing in the act was to be construed so as to prohibit supervisors from becoming or remaining members of labor organizations, but that employers should not be compelled to consider individuals defined as supervisors as employees for the purposes of any law, either national or local relating to collective bargaining. There was nothing in the Senate amendment which would have the effect of prohibiting supervisors from becoming members of a labor organization, and the first part of this provision was included presumably out of an abundance of caution."

Thus, it is clear that the first clause of Section 14(a) was inserted "out of an abundance of caution," and not to permit the Board to hold that supervisors are given *retroactive* protection for "unprotected" activity. Congressman Hartley, co-author of the Act, made the following statement on the floor of the House on April 15, 1947, in connection with debate on this part of the bill:[20]

> "In other words, this bill does not bar them [supervisors] from organizing but they cannot obtain the benefits of the act."

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[19]House of Representatives Report No. 510, 80th Congress, 1st Session, on H. R. 3020.

[20]93 Cong. Rec. 3522.

The minority members of the Senate Committee recognized that Section 14(a) did not do what the Board would now infer that it does.[21] While opponents' views and statements ordinarily may not be persuasive as to legislative intent, the following quotation is significant because it is a part of a report filed by members of the committee which drafted the legislation, and the statement was never denied during the very lengthy debates on the subject (p. 39):

> "We find seriously objectionable the complete exclusion from the procedures and protections of the act of supervisors as a class. The beguiling statement of principle in section 14 that recognizes their natural right to self-organization and self-help is made meaningless by the removal of the legal sanctions that give vitality and substance to that right."

The Board, as already noted, admits that the Act no longer accords "affirmative protection" to supervisors for union or concerted activities; but, the Board then announces another of its fanciful and meaningless phrases coined for this decision, *i. e.,* ". . . to say that such activities are no longer accorded affirmative protection is not to say they are tainted with illegality" [R. 45]. The decision cited the *Edward G. Budd* case, *supra* [R. 45, Note 25] in connection with its admission that "affirmative protection" has been removed from supervisors. We are unable to understand if the Board means by this that "negative protection" still exists, or just what it does mean by "affirmative protection." The court said in the *Budd* case (p. 575) that both *affirmative* and *negative* sections of the order were to be considered under the remand from the Supreme Court (*Edward G. Budd Mfg. Co.*

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[21]Senate Report 105, Part 2 (Minority Views), 80th Congress, 1st Session.

v. N. L. R. B. (1947), 332 U. S. 840, 68 S. Ct. 262, 92 L. Ed. 412), and the court vacated both the affirmative and negative parts of the order.

There is certainly no comfort for the Board to be found in the *Budd* case as to any of its theories in this case. The court said, for example (p. 579 of the Federal Reporter):

> "We believe it is clear that Congress intended by the enactment of the Labor Management Relations Act that employers be free in the future to discharge supervisors for joining a union, and to interfere with their union activities. The cease and desist provisions of the Board's order would enjoin the respondent from engaging in conduct in the future which is now lawful. They should, accordingly, be set aside."

The court refused in the *Budd* case to enforce an order issued *prior* to passage of the supervisor amendments. Here, where the conduct occurred *after* the amendments, the fruition of the intent and purpose of the statute requires that the order of the Board be refused enforcement, because the Board's order effects the emasculation of the disabling amendments as to supervisors.

D. The Board Erroneously Converted Cody's Status From That of "Nonemployee" to That of "Employee."

Since the Board premises its order in this case upon its conclusion that Cody was an "employee" on November 16, 1948, because "he was no longer 'employed as a supervisor'" [R. 46], we examine below the *Phelps-Dodge*[22] holding on which the Board relied for this con-

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[22]*Phelps-Dodge Corp v. N.L.R.B.* (1941), 313 U. S. 177, 61 S. Ct. 845, 85 L. Ed. 1271.

clusion. While Petitioner's case does not stand or fall depending on whether Cody was an "employee" on the date in question, we cannot let the Board's conclusion on that matter go unchallenged. Clearly, there are a number of material facts which distinguish this case and the *Phelps-Dodge* case. These distinctions remove the latter case as an authority for any finding or conclusion in this case.

First, the Supreme Court said that the question before it in the *Phelps-Dodge* case was "whether an employer . . . may refuse to hire employees solely because of their affiliations with a labor union" (p. 181). The refusal to rehire in that case was prompted by a condition (union affiliation) that existed at the time of the refusal to hire. Such is not true here.

Second, the court had before it a question as to whether the definition of "employee" in Section 2(3) of the Wagner Act excluded strikers who had obtained "substantially equivalent employment." Here the question is whether one who is specifically excluded from the "employee" definition comes under it after he has been discharged.

As to the first question, the case involved an order by the Board for Phelps-Dodge to re-employ two individuals who had been discharged before the effective date of the Wagner Act (July 5, 1935), and who had been refused re-employment *after* the law became effective, admittedly "because of their affiliations with the Union" (pp. 181-182 of the U. S. Reports). The court considered carefully the broad purpose of the Wagner Act and the historical development of labor unions' struggle to afford employees a vehicle for self-organization and collective bargaining (pp. 182-183). The court noted that self-organization could be thwarted as effectively by refusing to hire union members as by discharging them. So, the court ruled that Phelps-Dodge could be ordered to rehire

these individuals because the broad purposes of the statute dictated that employers could not refuse to hire because the applicant was a member of a union.

As to our case, union membership or activity did not enter into the decision not to re-employ Cody. The Trial Examiner specifically so found [R. 73], and the Board inferentially adopted his finding by holding that the "cause" which led to the refusal to rehire Cody was that he made "common cause" with the strikers while he was a supervisor.

In the *Phelps-Dodge* case the court was presented with the question of whether an applicant could be denied employment because of a condition which coexisted with the refusal. As to our case, the Board found that the refusal to rehire amounted to a violation because of something Cody did when he admittedly was *not* an employee, and not because of something he did while he *was* an employee or a condition that existed when he applied for employment. The Board here would make the statute an *ex post facto* law. There is nothing in the *Phelps-Dodge* language authorizing retroactive application so as to make admittedly "unprotected" activity become "protected." These are material and important differences in the two cases.

As to the second question, the *Phelps-Dodge* case does not dispute that the present definition of "employee" precludes the Board from ordering the former employer of a discharged supervisor to rehire him. The court had before it in that case the question as to whether the definition of "employee" prohibited reinstatement of those who had obtained "substantially equivalent employment" (p. 189). In that connection the court found that these applicants for reinstatement were members of the "general class, 'employees' " and that nothing in the definition specifically excluded them. Said the court, "To circumscribe

the general class, 'employees,' we must find authority either in the policy of the Act or in some specific delimiting provision of it" (p. 191). As the law is now written, there is not only authority but also a requirement for circumscribing "the general class 'employees,'" because of both "the policy of the Act" and a "specific delimiting provision of it." The general policy with respect to supervisors and the specific delimiting provisions in Section 2(3) of the Act have been discussed above.

The Court of Appeals for the District of Columbia considered the *Phelps-Dodge* case in a recent decision in connection with a "specific delimiting provision" of the Act.[23] The same proposition was urged before the court in the *Di Giorgio* case as is being argued by the Board in its decision in this case. The court described the argument in the former case as follows:

> "The contention is that . . . while the strikers were employed as agricultural laborers they were not included as employees under the Act, but that when they ceased to work as the result of the labor dispute they placed themselves within the terms of the Act."

The Board makes the same contention in this case as to supervisors by arguing that Cody became an employee "when he ceased to work," because he was at that time "no longer 'employed as a supervisor'" [R. 46]. In the *Di Giorgio* case the court had the following to say concerning this argument:

> "The essence of the construction urged—that while at work these laborers are not employees but when not at work they are employees—is too contradictory of terms to be adopted without some compelling evi-

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[23] *Di Giorgio Fruit Corp. v. N.L.R.B., supra.*

> dence of that meaning. For us to write that view into the present law would be to add something of major import which we cannot find already there."

The Board does not in our case dispel this contradiction by any "compelling evidence of that meaning." Yet the Board urged the contradiction by contending that Cody was an "employee" when he was "no longer 'employed as a supervisor.'" There is nothing in the Congressional reports, the hearings, or the debates on the legislation which would argue even in a slight degree for such an interpretation. The fact is, as we have noted, that the Board has attempted to perform a legislative function in its decision in this case. The court reminded the proponents of this theory in the *Di Giorgio* case that Congress is the proper forum for such an argument, when it said:

> "The argument represents a supportable view which would be valid as a legislative policy and valid if incorporated in a statute, but we do not find in this statute or in its legislative history any indications that it was a policy which motivated Congress when the statute was enacted."

So, the Board's utter disregard of the change in the statute between the date of the *Phelps-Dodge* case and the present one is a fatal error. While a discharged supervisor might be an "employee" under the facts of the *Phelps-Dodge* case, that cannot give comfort to the Board in its argument that the "delimiting provisions" of the Act's definition of "employee" may be ignored. If the Board had found that Cody was refused reinstatement because he was at the time of refusal a member

of the union, we would have before us a far different case. But when the Board makes an *ex post facto* law of the statute, as it would do here, it is going far beyond the doctrine of the *Phelps-Dodge* case. Likewise, the reasoning of the *Di Giorgio* case cannot be overlooked in view of the *specific* "delimiting provision" in the definition of "employee."

E. The Board's Decision Is in Conflict With Other Board and Court Decisions.

We have already noted that in writing supervisors out of the Act entirely, Congress was motivated in part by the vacillation of the Board[24] which left unions, employees, and employers uncertain from year to year. The majority decision in the instant case would lead one to believe that even after the passage of the amendments to the Act, the Board intends to persist in its practice of "blowing both hot and cold." In 1949, not long after the court spoke so forcibly in the *Budd* case, *supra,* as to the lack of protection for supervisors under the amended Act, the Board issued its decision in the *Alabama Marble* case, *supra.* In this case one question was the alleged discriminatory refusal to rehire a supervisor who was a member of and participated in a strike by the union—in fact, he was the picket-line captain. The Trial

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[24]*Union Collieries Coal Co.* (1942), 41 NLRB 961, 44 NLRB 165 (foremen may organize in an independent union); *Godchaux Sugars, Inc.* (1942), 44 NLRB 874 (foremen may organize in an affiliated union); *Maryland Drydock Co.* (1943), 49 NLRB 733 (no unit appropriate to the organization of supervisory employees); *Packard Motor Car Co.* (1945), 61 NLRB 4 (foremen are employees and therefore may organize and receive the protection of the statute).

Examiner held that "the logic of the *Budd* case applies with equal force to the present case . . ." (83 NLRB at p. 1074). The Board affirmed the Trial Examiner's ruling on the same grounds (at p. 1049). In another case decided in 1949,[25] the Board stated that the employer "had a right to warn his foreman against participating in the union activities of the rank and file," and said that the employer could have disciplined the foreman if it had so desired. In our case, however, the Board rests its legal conclusion of a violation squarely upon the Petitioner's refusal to rehire Cody because of his "participating in the union activities of the rank and file." One would conclude, therefore, that the same employer conduct which was permissible in 1949 decisions is unlawful in a 1951 decision, despite the fact that both decisions were rendered under the same statute.

Early in 1950 the Board ruled that a certain group of workers "were supervisors and, as such, outside the protection of the Act." (*Florida Telephone Corporation* (1950), 88 NLRB 1429, 1431.) The Board followed the same line in February of that year[26] and again in July when it affirmed the following ruling of the Trial Examiner:[27]

> "It is amply clear from the legislative history of the Act as amended, that when the Congress excluded supervisory employees from the protection of the Act, it thereby intended that supervisors should be with-

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[25]*El Dorado Limestone Co.* (1949), 83 NLRB 746, 748.

[26]*Pacific Gamble-Robinson Co., supra.*

[27]*Accurate Threaded Products Co., supra.*

out remedy when discharged or otherwise penalized by their employers for engaging in organizational activities. It was specified in the Senate Report on this subject (Senate Report No. 105 on S. 1126, 80th Congress, 1st Session) that this was so whether the organizational activity of the supervisors so penalized consisted of activity on behalf of a rank-and-file employees' organization, as here, or one composed solely of supervisors.

"To predicate a finding of unfair labor practices upon an employer's conduct in penalizing union activity by one of his supervisory employees, in view of the foregoing, seem to be squarely in conflict with the congressional intent" (p. 1373).

In the case just quoted the foreman in question had been discharged and not re-employed "because of his activities and membership in the union of . . . production and maintenance employees" (p. 1368).

In the *Pacific-Gamble* case, the Board affirmed the Trial Examiner's ruling that a supervisor *who had participated in a rank-and-file strike* was not entitled to reinstatement. The Board said (p. 485, note 14):

"Because we agree with the Trial Examiner that Webber is a supervisor, to whom Congress has denied the protection of the amended Act, we find that the Respondent did not engage in any unfair labor practice with respect to him."

The Board went one step further in a case decided in August of 1950,[28] wherein it ruled that statements amounting to interference, restraint, and coercion in violation of 8(a)(1) of the Act were not illegal when made to an

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[28] *Pure Oil Company* (1950), 90 NLRB 1661.

individual who served as a supervisor only one day each week. Said the Board (pp. 1661-1662):

> "Carder, although employed primarily in a rank and file capacity, regularly relieved Gang Foreman Hatch 1 day each week. On these occasions he performed the usual functions and exercised the customary authority of a gang foreman, a position which the parties stipulated is supervisory. We find, therefore that because of his regular and frequent employment as a gang foreman, Carder was a supervisor at the time the above statements were made. Accordingly, we conclude that the Respondent was privileged to inquire as to his union affiliation and to insist as a condition to Carder's continued employment as a supervisor that he relinquish his membership in the Union."

In a more recent case[29] (June, 1951), the Trial Examiner found that one Lee Collester had been discharged and not re-employed because of his union activity. But the Board ruled that Collester was a supervisor within the meaning of the Act and, therefore, found that the discharge was not violative of the Act.[30]

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[29]*Palmer Manufacturing Corporation, supra.*

[30]The Board took notice of the legal requirement for supervisors to abstain from union activity, stating as follows:

> "As Collester assisted in obtaining membership cards from some of the employees, a question may arise as to whether or not the Union represented an uncoerced majority on September 16, 1950." (Page 3 of mimeographed decision (D-5166) released June 29, 1951.) See also Point II.

A case released by the Board on July 2, 1951,[31] affirmed all of the rulings, findings and conclusions of the trial examiner who had recommended dismissal of a complaint because the alleged discriminatee was a supervisor. The supervisor, Earl A. Staiger, joined with rank-and-file employees to get a union organizer to enlist members in the union because of a new wage policy which resulted in less "take-home" pay for all employees as well as Staiger. The employer discharged Staiger for this "concerted activity" with rank-and-file employees. The trial examiner said (p. 3 of intermediate report [IR 450] attached to mimeographed decision):

> "If on this issue the Respondent is right [that Staiger was a supervisor] and the General Counsel wrong, it would follow that no unfair labor practice finding may be predicated upon the Respondent's discharge of Staiger. For, as the Board has ruled under analogous circumstances, the discharge of a supervisor for organizational activities on behalf of a rank-and-file union violates neither Section 8(a)(3) nor Section 8(a)(1) of the Act."

The reasoning and the conclusions reached in the above cases are fundamentally sound in logic and in absolute harmony with the provisions and purposes of the Act, but they are diametrically contrary to the reasoning of the three-man majority in our case. They are, however, representative of our position here. We discuss more fully under Point III our further arguments that

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[31] *Tri-Pak Machinery Service, Inc., supra.* See also discussion of this case under Point III, *infra.*

the refusal to employ Cody cannot be held to discourage membership or activity in a labor organization.

As this Court said in the *Wells* case, *supra,* at page 460:

> "There are more subtle, less perceptible ways by which a supervisory employee, with authority to hire and discharge, to promote and demote, may influence choice as between competing unions, or as between union and no union."

If the Board's majority decision in this case is permitted to stand, members of industry once again will find themselves at the mercy of the Board even if one should discharge and refuse to rehire a vice president because he refused to obey orders due to his union sympathies. There will be no way to compel neutrality by foremen.

It is submitted that a review of the above-cited Board cases, decided during 1949, 1950 and 1951, and a comparison of them with the decision of the majority in this case will prompt one to make the same remark as did the Supreme Court in the *Packard* case, *supra,* where it said at page 492:

> "If we were obliged to depend upon administrative interpretation for light in finding the meaning of the statute, the inconsistency of the Board's decisions would leave us in the dark."

All of the foregoing demonstrates that the Board's decision in this case violates the provisions and thwarts the purposes of the Act as it relates to supervisors. The Board should not be sustained in its program of inconsistent application of the provisions of the Act.

POINT II.

Cody Did Not Engage in "Concerted Activity" Within the Meaning of Section 7 of the Act; nor Did He Make "Common Cause" With the Striking Employees.

The Board found that the "cause" of Cody's refusal of employment was his "concerted activity" [R. 46-47], and the complaint alleged likewise [R. 8]. Therefore, if Cody did *not* engage in "concerted activity" within the meaning of Section 7 of the Act, the Board's order cannot be sustained. (*N.L.R.B. v. Illinois Bell Telephone Co.* (C. A. 7, 1951), 189 F. 2d 124.) Section 7 provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

The Board based its conclusions of violations upon its finding that "The refusal by Cody as a supervisor to perform rank-and-file work of strikers was concerted activity of a type which was protected under the Wagner Act" [R. 45]. We do not agree with this finding, but assuming *arguendo* that it is correct, it is, as noted in the dissenting opinion, immaterial whether Cody's action would have been "concerted activity" under the Wagner Act, because that Act was not in effect at the time of his activity. The question here is whether his activity was within the provisions of Section 7 of the Act (in effect at the time of his conduct), and was thus "immunized against reprisal" [R. 55].

A. Cody's Activity Was Not "Concerted."

An analysis of the undisputed facts in this case reveals unmistakably that Cody's activity was not "concerted." The reasoning of the court in the *Illinois Bell* case, *supra,* is applicable to the situation here. In that case the court held that a refusal by eight individuals to cross a picket line established by a union which did not represent them did not amount to "concerted activities" for "mutual aid or protection"; and that, therefore, there was no protection afforded by Section 7 of the Act. The Trial Examiner in the *Illinois Bell* case found that the eight employees "made common cause with those engaged in the economic strike . . ." In the instant case the Board found that Cody "was refused employment solely because he had, in the past, made common cause, in a manner which was not unlawful, with protected concerted activity by the rank-and-file union" [R. 48]. With respect to the question of making "common cause," the court said in the *Illinois Bell* case, "We think it is a novel theory that the mere refusal to cross a picket line . . . makes the one who refuses a party to the strike, but even so . . . such refusal was not for the 'mutual aid or protection' of the employees involved."

In the Cody case there is even less indicia of "concerted activity" than in the *Illinois Bell* case. Cody did not refuse to cross a picket line. In fact, he was willing to "haul" another "person and let him do the work" [R. 110, 189-190]. Cody did not act in combination or concert with anyone else. The Board reasons that he made

"common cause" with the strikers because he refused to perform a particular task assigned to him on September 28. This is a pure and simple conclusion, the meaning of which is not explained; and there is no evidence to support such a conclusion. Cody did not give as his reason for refusing to do the job assigned that he wished to aid or make "common cause" with the strikers. The fact is that when Superintendent Dreyer told Cody that he must decide which team (management's or the Union's) he would be on, Cody replied, "Can't I be on a team of my own?" [R. 319]. There is no resemblance to "concerted" action which may be inferred from that. The fact is that Cody refused to do the particular job for *personal* reasons. He said that he "wanted no part in the operation" [R. 196]; he said that he "had an actual fear of what would happen" to his family and home [R. 197]. No one connected with the Union or the strikers had spoken to Cody about the type of work he should or should not do [R. 188]. Cody alone set the standards by which he would work behind the picket line. He did "patrol" lines, which was done by gaugers who were on strike [R. 106-107], but he would not deliver strappings [R. 195] or run tickets [R. 67, 107, 179-183, 195-196]; he did report on number of pickets at certain locations, the wells which were pumping, and if tanks were ready to receive [R. 305-309], but he would not gauge and sample Yorba Linda Station [R. 110-111, 188-189, 318]. All of this is positive evidence that Cody's conduct was "individual" and not "concerted" action. On September 28 he forced his superior to give him an "order" and then flatly refused to obey on a strictly individual and personal basis [R. 108-111, 195-197].

In noting that there was no "concerted" action in the *Illinois Bell* case, the court gave the following description, which is wholly fitting to our case:

> "There is no evidence that these eight employees acted in combination or concert. They did not converse with each other or any other person regarding the activity in which they engaged . . . each acted in her own individual capacity." (P. 127.)

It cannot be disputed that Cody acted in his "own individual capacity," and the Board's finding that he engaged in "concerted activity" is wholly without foundation in fact, is not supported by substantial evidence, and is contrary to Cody's own testimony.

Since there is no evidence that Cody engaged in "concerted activity," but undenied evidence that it was *individual* action, the Board's conclusion is erroneous and its order is not sustainable, because Cody's action is *not* the type protected by Section 7 of the Act. The following quotation from the Board's decision in the *Panaderia Sucesion Alonso, et al.* (1949), 87 NLRB 877, 880 is appropriate in this case as it was there:

> "Because Section 7 grants rights exclusively to 'employees,' any concerted activity must be that of more than one 'employee' in order to obtain the protection of Section 7."

To go one step further, "concerted activity" between Cody and the strikers cannot exist, because the Board admits that Cody was not an "employee" when he engaged in his activity in question. Therefore, the fol-

lowing rule of the Board prohibits a finding of concerted activity (*Panaderia, supra,* p. 880):

> "We do not believe that one 'employee' and non-employees together may engage in protected concerted activities within the meaning of the Act."

Conversely, the rule is just as compelling if there is only one nonemployee and several "employees."

That the term "concerted activity" used in the Act has a prescribed meaning and cannot be used loosely as the Board did in this case is clearly established by the Supreme Court in the *International Rice Milling* case.[32] The court had before it in that case the question whether the union induced or encouraged employees to engage in "a concerted refusal" to perform work. The court found that the picketing "did encourage two employees . . . to turn back from an intended trip to the mill . . ."; but, said the court, the Act "contemplates inducement or encouragement to some concert of action greater than is evidenced by the pickets' request to a driver of a single truck to discontinue a pending trip to a picketed mill." The court pointed out that inducements to individual employees "generally are not aimed at concerted, as distinguished from individual, conduct by such employees." Just as there was no evidence in that case that there was inducement to "concerted" action, there is no evidence here that Cody's action was "concerted." On the contrary, the evidence is uncontradicted that Cody acted *on his own* by refusing to perform a particular task that was personally objectionable to him.

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[32]*N.L.R.B. v. International Rice Milling Co.* (1951), ... U. S. ....., 95 L. Ed. 777, 19 L. Wk. 4357.

B. Cody's Activity Was Not for "Mutual Aid or Protection."

Now, assuming *arguendo* that Cody's action was in "concert" with the strikers, the test of Section 7 of the Act still is not met because it could not be for "mutual aid or protection." In the *Illinois Bell* case, *supra,* the court said (pp. 127-128):

> "Assuming, however, contrary to what we think, that the involved employees engaged in 'concerted activities,' we are unable to discern from this record . . . how it can be held that such activities were for their 'mutual aid or protection.' They neither sought nor were entitled to seek on their own behalf any aid or protection from respondent."

That precise situation prevails in the Cody case. He did not seek anything from the Company, and he was not "entitled" to so seek, because Section 2(3) of the Act specifically excludes Cody as a supervisor from the definition of "employee." As a nonemployee he was not entitled to any protection of the Act and he could not do any of the things described as protected activities in Section 7. Moreover, just as employees and nonemployees cannot engage in "concerted activities" together, *a fortiori* they cannot join together for "mutual aid or protection" because there cannot be any *mutuality* of interest in union or collective bargaining matters. The Board always excludes supervisors from bargaining units, and has even gone so far as to find that labor unions are incapable of serving as the representative of employees if supervisors

participate.[33] In the *Wells* case the Board found that the union did not represent an *uncoerced* majority because a supervisor had campaigned and obtained members for the union. When the Board ignores the anomalous situation which obtains when it finds that a supervisor may engage in activities described in Section 7 of the Act and at the same time holds that such activities can destroy a union's representative capacity, it is shutting its eyes to the fundamental purpose of the statute which it was created to administer. Since Cody was not an "employee," since he had none of the rights described in Section 7 of the Act, and since the law precludes it, he could *not* engage in activities with "employees" for their "mutual aid or protection" within the meaning of the section. Therefore, even if he had acted in "concert" with the strikers, the action would not have been for "mutual aid or protection."

We are not disagreeing that, as the Board argued [R. 45], supervisors might be found to have acted with other employees for their mutual interest at a time when the former were included as "employees" under the Act. (*Packard Motor Car Co. v. N.L.R.B.* (1947), 330 U. S. 485, 67 S. Ct. 789, 91 L. Ed. 1040.) But in the *Packard* case foremen joined with foremen—not with employees supervised by them. It is because of this anomaly that, under the Act as it existed at the time of Cody's conduct and as it exists today, supervisors are excluded from the "employee" definition. (See Point I, *supra.*)

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[33]*Toledo Stamping and Mfg. Co.* (1944), 55 NLRB 865; *Alaska Salmon Industry, Inc.* (1948), 78 NLRB 185; *Palmer Mfg. Corp., supra.* In the last case, the Board sustained the discharge of a supervisor who had aided the union; it did not find it necessary to resolve the question of whether the union represented an uncoerced majority, because the refusal to bargain charge was dismissed for other reasons. See, also, *Wells, Inc.* (1946), 68 NLRB 545, enforcement denied (C. A. 9, 1947), 162 F. 2d 457.

C. Cody Did Not, nor Could He Legally, Make "Common Cause" With the Strikers.

The Board theorized that Cody "made common cause" and that he acted "in aid . . . of . . . rank-and-file employees" [R. 48, 49], all of which constituted activity described in Section 7, and for which he had the protection of the Act. The Board reached this farfetched and meaningless conclusion despite the lack of supporting evidence. Not only that, but it also ignored the absence of "concerted" action and non-existence of "mutuality" of interest, as well as the absolute incompatibility of supervisors and employees in the eyes of the Act. Moreover, the Board disregarded the requirement that to remain neutral an employer must forbid union activity by supervisors; and an employer is held in violation of the Act if his supervisors make "common cause" or act "in aid" of his rank-and-file employees.[34] This court pointed out in the *Wells* case, *supra,* that the Board cannot "have it both ways" (p. 460). If the Board's theory in this case is permitted to prevail, that exactly would be the result—a foreman would be protected against reprisal for conduct which is a violation of the statute and which would jeopardize the bargaining rights of a union.

But the same law which penalizes a union and an employer alike if the latter's supervisors make "common cause" or act "in aid" of his "employees," certainly does not protect those supervisors from "reprisal" for such activity. As noted in Point I, *supra,* the Congress changed the statute so as to correct this anomalous situation which

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[34]*T. B. Martin, et al., d/b/a Standard Feed Milling Co.,* 94 NLRB No. 191, June 18, 1951, where an employer was held accountable for unauthorized statements by a supervisor. *Otis L. Boyhill Furniture Co.* (1951), 94 NLRB No. 232, where an employer was held in violation of the Act because a supervisor who was a member of the union favored other union members. See *N.L.R.B. v. Bird Machine Co.* (C. A. 1, 1947), 161 F. 2d 589, 591.

prevailed under the Wagner Act, and the Board should not be permitted to flout the Congressional intent. If a supervisor is wholly unprotected by the Act for union or concerted activity, and this is admitted by the Board [R. 46], he may not thereafter don the cloak of protection defined in Section 7, simply because the activity would have been protected under other and different facts. The test of protection is to be applied to the activity based on the facts as of the time of occurrence. Section 7 protects "employees" in certain activities, but it does not provide that activities *not* protected when they happen may later *become* protected by changed circumstances.

Therefore, even if there were evidence to support the conclusion that Cody engaged in "concerted" activity, and that he made "common cause" with, and that he acted "in aid" of the striking employees, the conduct in question clearly is not that which is "immunized against reprisal" [Dissenting Opinion, R. 55].

The Board's conclusion that Cody's act of insubordination is protected by Section 7 is contrary to the evidence and the law because:

1. There was no "concerted activity";
2. There was no activity for "mutual aid or protection";
3. Cody did not nor could he legally make "common cause" with the strikers;
4. Cody could not engage in acts described in Section 7 because he was not an "employee";
5. The law affords no protection to supervisors' activities in union and collective bargaining matters; and, more than that, the law penalizes employers and unions for supervisors' union activities.

POINT III.

The Refusal by the Petitioner to Employ Cody Did Not, nor Could It Be Inferred That It Would, Discourage Membership of Employees in a Labor Organization Within the Meaning of Section 8(a) (3) of the Act.

The Board ruled that Petitioner violated Section 8(a) (3) of the Act by refusing to re-employ Cody on and after November 16, 1948 [R. 44]. This section of the Act makes it an unfair labor practice for an employer

> ". . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

In support of its ruling, the Board said that the "refusal necessarily discouraged membership in . . . the labor organization involved . . ." [R. 49], and ". . . we think that membership in the rank-and-file union was palpably discouraged . . ." by the refusal [R. 47, 48]. It is to be noted that the Board's finding above is based entirely upon an assumption that the refusal *necessarily* discouraged membership and that the Board *thinks* it did. There is not even any pretense that evidentiary support exists, much less that there is "substantial evidence on the record considered as a whole" (Section 10(e) of the Act).[35]

The Board agreed that "the amendments [Section 2(3) of the Act] privilege the . . . discharge" of Cody [R. 46], and that Petitioner refused to re-employ him because he refused to perform assigned work at a time when he was not an "employee" [R. 48-49]. Thus

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[35] *Universal Camera Corp. v. N.L.R.B.* (1951), ... U. S. ....., 95 L. Ed. 298, 19 L. Wk. 4160.

we are presented with this situation: (1) Cody refused to do *certain* work normally performed by employees who were then on strike; (2) he was legally discharged for this refusal; (3) he was later denied re-employment because he had so refused. On these facts, and supported only by the conclusion that Cody's action was "in aid" of "rank-and-file" employees,[36] the Board jumped to the conclusion that the refusal to re-employ him "necessarily discouraged membership in, and concerted activity on behalf of . . ." the Union. The latter conclusion is based upon the former conclusion; the former conclusion was based upon an inference not supported by evidence and is contrary to the law. (See Point II, *supra.*)

There is no process of logical reasoning by which one can conclude that the refusal to rehire a supervisor discharged for legitimate and legal reasons "necessarily discouraged membership" in the Union of the rank-and-file employees. This is ably and logically discussed by the Trial Examiner [R. 74-75] and by the dissenting members of the Board [R. 56-57].

A. If Any Discouragement of or Interference With Union Membership Were Occasioned by the Discharge of and Refusal to Employ Cody, It Would Be Permissible Under the Act.

Let us analyze the theory upon which the Board has always drawn an inference, in the absence of clear evidence, that discrimination has the effect to "discourage" membership in a union. The Board's reasoning is that the discriminatory treatment constitutes a warning to other employees not to do the same thing the discriminatee did. For example, if one who is a member of or active in

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[36]See Point II, *supra,* for our discussion that this conclusion is erroneous.

a union is discharged therefor, the Board reasons that the natural consequence is to discourage others from such membership or activity.[37] There must, however. be a *direct relationship* between the activity causing the discharge or other discrimination and the activity found to be discouraged. Clear proof is not required that a discrimination *actually* discouraged membership and activity, *if* the status and activity of the discriminatee is akin to the status and activity of employees who are found to have been discouraged.[38] In the *Pennsylvania Greyhound* case, *supra,* the Board said (p. 38), "It is not necessary to discharge every union member to discourage union membership or to break a union." There the Board meant that the discharge of one member would serve as a warning to other members. Where courts have been presented with the precise question as to whether there is substantial evidence to support an inference that union membership was discouraged, they have examined the entire record, including the presence or absence of anti-union bias.[39] Where, as in this case, the Board finds that there

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[37]In the first decision rendered by the National Labor Relations Board, *Pennsylvania Greyhound Lines, Inc.* (1935), 1 NLRB 1, the Board sounded the keynote of the rationale by which it concludes and courts agree that discrimination discourages membership and activity in a union. There the Board said (p. 35), "They [the discharges] would have a two-fold effect—they would not only immediately affect the discharged employees but would also discourage other employees from joining or remaining members of . . . [the union]." The Board went on to say two sentences later, "But the above employees chosen as examples were chosen because of their union membership."

[38]*N.L.R.B. v. Walt Disney Productions* (C. A. 9, 1944), 146 F. 2d 44, 49, wherein this Court held that discouragement "may reasonably be inferred from the circumstances of the discharge . . ." See also *Stonewall Cotton Mills, Inc. v. N.L.R.B.* (C. A. 5, 1942), 129 F. 2d 629, 632.

[39]*N.L.R.B. v. Air Associates, Inc.* (C. A. 2, 1941), 121 F. 2d 586, 592.

is no evidence "indicative of an anti-union animus on the part of the Respondent (Petitioner), now or in the past" [R. 38]; where the Board is unable to find that Petitioner was "motivated" by a purpose to violate the law [R. 47]; then, there must be some *reasonable basis* for concluding that Petitioner's action "discouraged membership" in the Union. Most assuredly, the usual basis for such conclusions by the Board is not present here, because Cody's conduct which prompted the Petitioner to discharge and refuse to rehire him admittedly was not protected under the Act.

In the *Pacific Lumber Co.* case,[40] the Board alluded to the legislative history of the Wagner Act in this connection, but a reference to the reports, hearings, and debate on that Act reveals that Congress found that employers used the device of discharge and other discrimination "to discourage" *other* employees in the *same status* as the discriminatee from joining or participating in union activity. It was this practice that Congress was aiming at when it wrote Section 8(3) in the original Wagner Act. In the *Pacific Lumber* case, *supra,* the Board noted "that *normally* the discharge of an employee because of his union membership or activity necessarily results in discouraging union membership . . ."(Emphasis added.) The facts of this case and the situation presented are not, however, "normal," but rather involve "novel circumstances" [R. 51]. Thus, the Board has applied its doctrine for *normal* situations to an admittedly *abnormal* one.

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[40]*Pacific Lumber Co.* (1943), 49 NLRB 1145, 1146.

As noted above, the theory upon which the Board may "infer" that union membership is discouraged is that the discrimination holds up the discriminatee to other employees as an "example" of what may happen to them if they do the same thing that the discriminatee did. Since the Board has found that the conduct for which Cody was denied re-employment was done at a time when he could be discharged therefor, at a time when he was a supervisor and a member of management, and at a time when he was not even an "employee"; then, the conduct which would be discouraged by the refusal to rehire is *union activity by a foreman* (assuming, without admitting, that Cody engaged in union activity as envisaged by the Act). But, discouraging the union activity of a foreman is permissible, and it cannot be violative of Section 8(a)(3), or any other part, of the Act.[41] That the Board erred in reaching the legal conclusion that union membership and activity by rank-and-file employees was discouraged in this case is demonstrated by the rationale of the *Tri-Pak* case, *supra*. In the latter case the trial examiner ruled, with Board approval, that interference with the rights of, and discouraging membership and activity in a union by, rank-and-file employees cannot flow from the interference with a supervisor's union activity. The trial examiner said in that connection (page 3 of intermediate report attached to mimeographed decision of the Board):

> "If on this issue the Respondent is right and the General Counsel wrong, it would follow that no un-

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[41] *N.L.R.B. v. Edward G. Budd Mfg. Co., supra; Tri-Pak Machinery Service Co., supra.*

> fair labor practice finding may be predicated upon the Respondent's discharge of Staiger. For, as the Board has ruled under analogous circumstances, the discharge of a supervisor for organizational activities on behalf of a rank-and-file union violates neither Section 8(a) (3) nor Section 8(a) (1) of the Act. . . . The General Counsel, however, adduced no evidence of any threat or warning to employees, other than, perhaps, such threat as might be found implicit in Staiger's discharge, if, but only if, the discharge itself is not immunized by Section 2(11) from the reach of Sections 8(a) (1) and 8(a)(3). There is proof that the Respondent questioned Staiger, as well as others in its employ, about Staiger's organizational activities. But, as the General Counsel concedes, the Respondent's interrogation of Staiger may be found violative of Section 8(a) (1) only if it is found also that he was not a supervisor within the statutory definition."

Let us apply the rule of reason and common sense to the facts of this case and from that approach see what reasonable inference may be drawn as to the reaction of rank-and-file employees to the treatment accorded Cody.

There was a strike, "economic" in nature as distinguished from an "unfair labor practice strike," among the employees of Petitioner [R. 41]. The employees were aware that at the conclusion of the strike, all employees were reinstated to their old jobs if they wanted them [R. 35-36, 345-346]. They knew that the employer (Petitioner) had been dealing with the Union for many years, and there was no evidence of anti-union animus on the part of the Petitioner [R. 38]. During the strike all foremen, including Cody, worked at various jobs with knowledge

thereof to the Union [R. 264, 270-273, 352, 361-362]. After the strike had been in progress for some four weeks, the Petitioner started certain operations and began to accelerate others [R. 263-265]. At that time Cody, who was a part of management with no rights under the Act and who was not an "employee," was asked to perform a particular task which he flatly refused to do. As a result he was discharged. Thereafter, Cody was denied re-employment because he had refused to do certain work during the strike. Employees know that under the Act foremen are a part of management and that they cannot participate in union affairs [R. 169-170, 360]. (*Lily-Tulip Cup Co., supra.*) If we assume for the sake of our argument that Cody's refusal constituted "concerted" action, what is the lesson that other employees will gain from the fact that Cody was refused re-employment? It is simply that if they later become supervisors they must be a part of management as the law intends, and that they must assist the management in the performance of legitimate operations. It is that if there is a strike during which the employer operates its business, they as supervisors must do the work assigned or they will be guilty of "unprotected insubordination" [R. 57], and that when they are insubordinate they can be lawfully refused re-employment in any position for that reason.

Employees and their unions know that a company has the right to operate its business, and that which is described immediately above is the only "lesson" that will be taught by the refusal to rehire Cody. Therefore, by the refusal to rehire Cody, Petitioner has discouraged, if

indeed there is any discouragement, foremen and other supervisors from "making common cause" with the Union, or acting "in aid" of the Union or strikers. There is just no other reasonable conclusion that may be reached, and the Act was amended in 1947 in such a manner as to permit employers to discourage and even prevent supervisors from engaging in just such union activity.

It is noteworthy that the Board did not find that Cody was denied re-employment because of anything he did at the time when it was protected by the Act. To the contrary, the Board found that Petitioner was within its legal rights to discharge Cody. The evil, so found the Board, lies in the fact that Petitioner wanted to *keep* him discharged. Any discouraging effect flowing from the discharge admittedly cannot be remedied, but, said the Board, the discouraging effect which it *thinks* flowed from the refusal to rehire can be remedied. In its attempt to rationalize itself out of this paradoxical position, the Board merely states that if the status of Cody had been different when he engaged in the conduct, he would have enjoyed the protection of the Act. This, we submit, is an attempt by the Board to rewrite the statute by administrative interpretation.

B. The Potlatch Case.

This Court recently considered the matter of what constitutes "discrimination . . . to discourage" membership in a union.[42] The instant case involves similar principles to those before the Court in that case. Noted below are some of the important similarities:

> (1) Here, as was true in the *Potlatch* case, Petitioner "had exhibited no anti-union prejudices . . .," and the Board so found [R. 38, 47].

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[42] *N.L.R.B. v. Potlatch Forests, Inc., supra.*

(2) This Court noted in the *Potlatch* case, in connection with the Board's inferences, "The only evidence to support such a finding is the conclusion that Potlatch must have realized the inevitable consequences . . ."; in this case, the only support for the Board's finding that membership and activity in the Union by "employees" is discouraged is the naked statement that it "necessarily" does so, and the fact that three members *"think"* such is the result.

In this connection, it should be noted that the Board certainly cannot rely upon its so-called "expertness" as support for this subjective opinion—the experts are equally divided here. The Trial Examiner and two members of the Board found that the refusal to rehire Cody did not violate the Act [R. 57, 73]. As noted by the Court in *Wyman-Gordon Co. v. N.L.R.B.* (C. A. 7, 1946), 153 F. 2d 480, 483, ". . . such contrariety of views may be properly taken into consideration, in fact [we think] that it has a material bearing upon the question as to whether the Board's findings are substantially supported."

(3) This Court further noted in the *Potlatch* case, with respect to conclusions as to inevitability, "Such a conclusion is not enough to support the finding of discriminatory motive . . ."; in this case, the Board gives cavalier treatment to the lack of motive "to interfere with and discourage . . . union activity" [R. 47], and ignores the fact that all evidence in the record shows absence of illegal motive [R. 79, 346]. The Board here not only drew an inference upon pure speculation without any evidence to support it, but it also did so in the face of positive evidence to the contrary [R. 38, 47, 55, 66, 73, 100, 170-171].

(4) However, even if we assume that the refusal to rehire Cody had some effect of discouraging union activity, it does not follow that the refusal is *ipso facto* a violation of the Act. This Court pointed out in the *Potlatch* case that an employer does not violate the law by every act which has "a tendency to discourage union activities . . ." and that an employer is within his legal rights to engage in "conduct [that] is regarded as a legitimate weapon of economic warfare." In the instant case Cody's conduct was a direct result of Petitioner's legitimate operations during the strike admittedly for *"bona fide* business considerations" [R. 38]. It was on the day when operations were to be accelerated that Cody refused to perform his assignment. As we have argued in Point I, *supra,* Cody owed his allegiance to management and not to the Union, and he could be expected to perform whatever task was assigned to him.

Since Petitioner was permitted under the Act to operate its business,[43] since it had a right to demand that supervisors perform any work assigned,[44] since Cody's discharge was permissible [R. 74, 82-84], since he was refused re-employment for the same reason that he was discharged [R. 43-44, 54, 74, 148-149, 321, 332], it follows that Petitioner refused to rehire him because of a "permissible criterion"[45] [R. 49].

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[43]*N.L.R.B. v. Mackay Radio & Telegraph Co., supra; N.L.R.B. v. Potlach Forests, Inc., supra; International Shoe Co., supra.*

[44]See Point I, *supra.*

[45]*N.L.R.B. v. Waumbec Mills, Inc.* (C. A. 1, 1940), 114 F. 2d 226.

C. The Panaderia Case.

The Board only half-heartedly and superficially attempts to distinguish the instant case and the *Panaderia* case[46] [R. 48]. The dissenting members are correct that "the majority's basic conclusion" is unacceptable [R. 56]. But the Board passes over this point lightly by saying that "the discharge in that case (*Panaderia*) was one which was clearly aimed at the activities of agricultural employees . . ." [R. 48]. There is no difference. The discharge here as well as the refusal to rehire was "aimed at activities" of supervisors. Both agricultural laborers and supervisors are excluded from the "employee" definition in the Act. As noted in the dissenting opinion [R. 56], there is no logical reason for not applying the usual rule that the "incidental effect of discouraging" membership "does not cause . . . privileged conduct to assume the character of an unfair labor practice" [R. 56]. Yet, that is exactly what the Board would do in this case. It agrees that the conduct of discharging was privileged; it agrees that the refusal to rehire was for the same reason as the discharge; but it then orders Cody hired because it *thinks* union activity has been discouraged. The Board would change the character of Petitioner's conduct from "privileged" to "illegal," although nothing occurred in the interim to warrant the change. On what theory would the Board do this? Simply because the Board *thinks* the conduct "necessarily" discouraged union activity. The Board attempts to pull itself up by its own bootstraps in an effort to explain this subjective conclusion—it holds that Petitioner could not have done what it did *if* the facts and the law had been different.

Since the finding by the Board that union activity of the rank-and-file was discouraged is based on nothing but an inference, and since it is not a reasonable inference, this Court should not sustain it.

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[46] *Panaderia Sucesion Alonso, et al.* (1949), 87 NLRB 877.

POINT IV.

Cody Was Discharged "for Cause" Within the Meaning of the Act; He Was Refused Employment for a "Cause" Which Was a "Permissible Criterion" for Such Refusal Within the Meaning of the Act.

A. The Meaning of "For Cause."

An employer may discharge any individual "for cause" with full immunity from the provisions of the Act.[47] The term "for cause" is one of art with a definite meaning as it is used in connection with the application of the Act. It may have a different meaning in the parlance of arbitration under a labor contract, or in the opinion of union leaders and members, or in the judgment of an industry personnel director. There has never been any doubt, however, as to what it meant under the Wagner Act and what it means under the present Act. The Supreme Court settled this in the first case it decided under the Wagner Act.[48] In that case the court said (pp. 45-46):

> "The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for in-

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[47]We shall discuss *infra* the effect of the added phrase in Section 10(c) of the Act as amended in 1947, which provides "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."

[48]*N.L.R.B. v. Jones & Laughlin Steel Corp.* (1937), 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893.

terference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion."

In a companion case at that time,[49] the court said (p. 132):

> "The act does not compel the petitioner to employ anyone . . . The act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees . . . The petitioner is at liberty, whenever occasion may arise, to exercise its undoubted right to sever his relationship for any cause that seems to it proper save only as a punishment for, or discouragement of, such activities as the act declares permissible."

Thus it is that the Supreme Court has said that an employer may discharge or refuse to hire for any reason, good or bad, so long as it is not prohibited by the Act. That is "for cause." The Court of Appeals for the Fifth Circuit stated it as follows (p. 632):[50]

> "An employee, though he belongs to or is an officer of a union, may, like any other employee, be discharged for any reason or for no reason at all, unless it is for a reason *prohibited by the Act.*" (Emphasis added.)

The question presented in our case is much easier and simpler than the usual case, because here the Board agrees that the discharge of Cody was privileged [R. 46], *i. e.,*

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[49]*The Associated Press v. N.L.R.B.* (1937), 301 U. S. 103, 57 S. Ct. 650, 81 L. Ed. 953.

[50]*Stonewall Cotton Mills, Inc. v. N.L.R.B., supra.*

it was "for cause." The only question, then, is whether the refusal to *rehire* him was privileged, *i. e.,* was *it* "for cause"? We discuss Cody's case, therefore, as one of an individual who has been discharged "for cause" and is seeking re-employment. Upon seeking to be rehired, he was refused for the same "cause" that prompted his discharge. This, too, is admitted [R. 46-49, 54]. But, says the Board, that which was privileged conduct by the Petitioner when it discharged Cody lost its privileged character when Cody sought re-employment. The Board reaches this conclusion because, in its interpretation of the Act, Cody became an "employee" after he was discharged. Then, reasons the Board, he can be ordered reinstated to any rank-and-file job which was open, even though he was discharged "for cause"—that is, for activity which was not protected under the Act. If Cody had been an employee when he engaged in the activity, he would have enjoyed the protection of the Act, says the Board; therefore, since the Board claims he was an "employee" when he asked for "a job back" [R. 153, 200, 207], it says Cody's activity must be viewed in the light of his status at the time of application instead of at the time he engaged in the activity. There is nothing in the law, the decisions thereunder, or in the legislative history of the Act to warrant the Board's indulgence in these inferences based upon hypotheses and speculation.

We do not wish to argue here the question as to whether the *Phelps-Dodge* case[51] stands for the proposition that any discharged individual thereafter bcomes an "employee" under *all* circumstances. As we have noted

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[51]*Phelps-Dodge Corp. v. N.L.R.B., supra.*

in our argument under Point I, *supra,* the *Phelps-Dodge* case is limited in its ruling. For the sake of a part of our argument under this point, however, we shall assume that Cody was an "employee" on and after November 16, 1948, for the limited purpose of enjoying an immunity against reprisal for union membership or activity obtaining at a time when he was under the Act's coverage. But we certainly do not agree with the Board's holding that "the only form of 'unprotected' concerted activity which could privilege the Respondent's [Petitioner's] refusal to hire him was such as would justify the refusal to reinstate any 'employee'" [R. 46].[52] Nor do we agree that the *Phelps-Dodge* case can serve to support the Board's holding in this case. In fact, that case does not even involve the same question we have here. The question to be answered in this case is whether Cody's activity was protected by the Act *at the time he did it,* and not whether it would have been protected *if* his status had been different when he did it.

B. Cody's Activity Was Unprotected Even if He Had Been an Employee.

For the sake of fully arguing our point that Cody was discharged and refused re-employment "for cause," we shall assume first that he was an "employee" under the Act and, therefore, a beneficiary of its protective features at the time of his so-called "concerted activity." Even if Cody *had* been an "employee," even if he *had* engaged

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[52]We discuss on page 71 under this Point the lack of consistency of the Board's ruling in the *United Elastic* case, cited in Note 28 [R. 46], and its holding in this case.

in "concerted activity," even if his acts *had* been for "mutual aid or protection" of himself and strikers, it still remains that his refusal to perform the work in the manner he did amounted to "unprotected" activity.

The Board implied that activity is "*un*protected" only if it is "tainted with illegality" [R. 45]. Apparently the Board would have us believe that the only " 'unprotected concerted activity' constituting 'cause' for the discharge of any employee" is "activity akin to picket line violence, wilful destruction of . . . property, a sitdown strike," etc. [R. 46]. At any rate, those are the only kinds of "unprotected concerted activity" alluded to by the Board in its decision. But those are not the only kinds of activity which have been found by the Board and courts to constitute "cause" for discharge (and refusal to reinstate), even though the activity occurred in connection with union affairs.[53] We shall discuss a few cases, not all by any means, wherein the Board and the courts have found that certain kinds of activity, not illegal in character and not limited to those enumerated in the Board's

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[53]*Panaderia Sucesion Alonso, et al., supra; International Brotherhood of Teamsters, etc. (International Rice Milling Co.)* (1949), 84 NLRB 360; *Fontaine Converting Works, Inc.* (1948), 77 NLRB 1386, 1387-1388; *The Fafnir Bearing Co.* (1947), 73 NLRB 1008, 1011; *N.L.R.B. v. Montgomery Ward & Co.* (C. A. 8, 1946), 157 F. 2d 486; *C. G. Conn, Ltd. v. N.L.R.B.* (C. A. 7, 1939), 108 F. 2d 390; *Loveman, Joseph & Loeb v. N.L.R.B.* (C. A. 5, 1945), 146 F. 2d 769; *Carnegie-Illinois Steel Corp., supra; Greater New York Broadcasting Corp.* (1943), 48 NLRB 718, 720; *The Hoover Co. v. N.L.R.B.*, C. A. 6, No. 11223, July 9, 1951, ... F. 2d ....., 28 Labor Relations Reference Manual (BNA) 2353; *Home Beneficial Life Insurance Co. v. N.L.R.B.* (C. A. 4, 1947), 159 F. 2d 280; *U. A. W., et al. v. Wisconsin Employment Relations Board* (1945), 336 U. S. 245, 69 S. Ct. 516, 93 L. Ed. 651; *N.L.R.B. v. Draper Corp.* (C. A. 4, 1944), 145 F. 2d 199; *Wyman-Gordon Co. v. N.L.R.B., supra.*

decision, are adequate "cause" for discharge and "permissible criterion" [R. 49, Note 33] for refusing to hire.

For the three weeks Cody worked during the strike, he was playing a game of "pick and choose." He wanted to be the sole judge of what work he would do and how it would be done. He did not pick management as his "team", but he did not choose to go on strike. Cody did not wish to play on either management's *or* the Union's team. He testified that he wanted to play on a "team of [his] own" [R. 319]. He was willing to "ride lines" [R. 194], "haul" another person around to do the very work that he (Cody) didn't want to do [R. 109-110, 189-190]; but, he would not deliver a "run ticket" or a "strapping report" [R. 67, 107, 179-183, 195-196], nor would he gauge and sample Yorba Linda station [R. 110, 195]. Cody's behavior in this regard was very similar to that of the employees in the *Montgomery Ward* case, *supra,* where the employees refused to handle the orders from a store on strike, but did handle other orders. The court found that such was not "protected concerted activity," and stated as follows (p. 496):

> "While these employees had the undoubted right to go on a strike and quit their employment, they could not continue to work and remain at their positions, accept the wages paid to them, and at the same time select what part of their allotted tasks they cared to perform . . ."

This quotation accurately described Cody's activity. He never did say he wanted to go on strike. In fact, when he was asked to go to Yorba Linda Station to take samples for the month-end report, he proposed alternatives such

as that he be permitted to "haul" another; but he did not say that he wanted to join the strikers in order to help further their cause. Instead, he told his superior that he would "have to give the order" [R. 110, 195]. The court went on to say in the *Montgomery Ward* case, "Since these employees were lawfully discharged, they did not remain employees" (p. 496), and that "there was no duty . . . to reinstate them" (p. 497). The court also said that the activity of these employees was not "protected by Section 7 of the Act" (p. 497). The court said that as long as these employees "did not leave the premises nor the employment . . ." there was an obligation on their part "to obey the reasonable instructions of the employer . . ." (p. 497). Therefore, even if Cody *had* been an "employee" at the time of his refusal, his behavior would have amounted to conduct which is "unprotected" by the Act and, therefore, amounted to "for cause."

The *C. G. Conn* case, *supra,* involved the discharge of some employees who had refused to work overtime and who were ordered reinstated by the Board on the theory that the employees had engaged in "protected concerted activity" under the Act. In that case the court refused to accept the Board's conclusion that these employees had engaged in protected activity. The court said in effect that an employee cannot be on strike and at work simultaneously, and stated (p. 397):

> "We think he [the employee] must be on the job subject to the authority and control of the employer, or off the job as a striker, in support of some grievance."

See also *N. L. R. B. v. Illinois Bell Telephone Co., supra.* The court went on to say in the *Conn* case (p. 397):

> "We are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him. That is plainly what was sought to be done in this instance. It is not a situation in which employees ceased work in protest against conditions imposed by the employer . . ."

Once again we see an amazing similarity existing between the Cody case and one wherein the law has been clarified by a court. The Board's order cannot be sustained, therefore, even under its theory that if Cody had been an "employee" his activity would have been protected.

In the *Loveman, Joseph & Loeb* case, *supra,* the Board found that an employee (Martha Stewart) had been illegally refused re-employment after having concluded that there was a "reasonable likelihood" that she had been discharged "for cause." (*Loveman, Joseph & Loeb* (1944), 56 N. L. R. B. 752, 762.) The Board rejected the company's claim that it had refused Stewart re-employment because of her earlier discharge due to insubordination, and ordered her re-employed because of its finding that she had been refused "because of her union affiliation" (p. 763). The court reversed the Board, holding that (146 F. 2d at p. 771):

> "If the petitioner was justified in discharging Mrs. Stewart for insubordination, it was justified in not re-employing her for the same reason, because there is no evidence whatsoever of any change of heart on the part of the employee or of any repentance for the insubordinate acts that justified her discharge in

> the first place, and since the employer was justified in the initial discharge it was justified in keeping her discharged."

The same situation prevailed in the Cody case. He did later admit that he had been wrong, but he said that he would do the same thing again [R. 148-149, 152, 323, 330, 352]. The Board's argument that Petitioner cannot *keep* Cody discharged even though it discharged him "for cause" must fall when it is exposed to the light of reason and judicial decisions directly on the point.

There are numerous other cases wherein the Board and courts have found conduct to be not "protected" under the Act even though it was neither illegal nor limited to the kind described by the Board in its decision [R. 46]. for example, the Court of Appeals for the Sixth Circuit ruled recently in the *Hoover Co.* case, *supra,* that a customer boycott espoused by the union and participated in by certain union officer employees did not give the employees immunity from discharge. The court said, "The company was not obliged to employ the members of the local executive board in view of their refusal to terminate the boycott." The boycott involved in the *Hoover* case was not the kind outlawed by the Act, nor were there any charges of law violations against the union involved in the case. The conduct there was *union activity* of the purest kind, and yet it was found not to be "protected concerted activity." There is just no basis for the Board's implication that Cody must be ordered employed because, and only because, his activity had some connection with a strike and, therefore, "necessarily" discouraged Union membership and activity.

In the *Fontaine Converting* case, *supra,* the Board found that certain striking employees' "concerted activity" was not "protected" because ". . . the employees in question walked out, not to advance their own interests, but merely to further the interests of their foreman who they believed was demoted because of the appointment of the new general foreman" (pp. 1387-1388). In that case the Board said, ". . . their concerted activity was not of the character protected by the Act." That activity was not "tainted with illegality."

In the *Wyman-Gordon* case, *supra,* the court reversed the Board's order that employees who had interrupted production with their union activities and had been discharged therefor should be reinstated. The conduct of these employees in the *Wyman-Gordon* case was not "tainted with illegality," nor did it amount to "picket line violence, wilful destruction of the Respondent's property, a sitdown strike" [R. 45-46]. But the conduct was against the interests of the company in the legitimate operation of its business, and the *real* reason for the discharges was the interference with production. This was "for cause." Therefore, the fact that union business and affairs were mixed up in such conduct did not give the employees involved the protection of the Act.

Likewise, the *real* reason for Cody's discharge was his "unprotected" refusal to do the work assigned. It was "for cause" and his conduct cannot be given "protected" status by administrative speculation and dealing in hypotheses.

This Court held in *N. L. R. B. v. Citizen News Company* (C. A. 9, 1943), 134 F. 2d 970, 974:

> "The fact that a discharged employee may be engaged in labor union activities at the time of his discharge, taken alone, is no evidence at all of a discharge as the result of such activities. There must be more than this to constitute substantial evidence."

The above language of this Court is even more applicable to the instant case because (1) the individual involved here was not an "employee," (2) there was no "concerted" action. (3) there was no activity for "mutual aid or protection," and (4) the Board is attempting to force the re-employment of an individual who it admits was legally discharged.

In none of the cases cited above was the activity of the employees "tainted with illegality." Yet their conduct was not "protected" by the Act. We submit that this Court should remind the Board of the admonition of the Supreme Court more than 14 years ago when it said:

> ". . . the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion." (*N. L. R. B. v. Jones &Laughlin Steel Co., supra,* at p. 46.)

We have discussed above the reasons why the Board's order cannot be sustained even under its theory that the activity *would* have been "protected" *if* Cody had been an "employee" at the time of his refusal to do assigned work. Let us now examine our point that Cody was discharged and refused re-employment "for cause," in the light of the status he *actually* occupied at the time of

his refusal to obey orders. Even under the Wagner Act, which included supervisors as "employees," the Board recognized that supervisors owed a greater degree of allegiance to their employer than did the rank-and-file employees.[54]

There was a strike involved in the *Greater New York Broadcasting* case, in which a supervisor engineer participated. This engineer led management to believe that he would return to work and "assist in returning the station to the air" (pp. 720-721), but instead he remained on strike. He was discharged and the Board upheld the right of the employer to do so, stating that the engineer had engaged "in deceptive conduct inconsistent with his duty to respondent as chief engineer." The whole reason for not ordering the employer to re-employ the engineer was that he was discharged "for cause." He was not, therefore, ordered reinstated even though the activity was "concerted" and *was* for "mutual aid or protection." Cody's conduct was wholly "inconsistent with his duty" as an assistant foreman. There is certainly greater basis for holding that Cody's conduct was not "protected" than there was for holding the engineer's was not, even if Cody had enjoyed the Act's protection at the time.

There are numerous cases which make clear that an employer is entitled to operate his business and even meet economic force with economic force.[55] Therefore, an em-

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[54]*Greater New York Broadcasting Corp., supra; Carnegie-Illinois Steel Corp., supra.*

[55]*N.L.R.B. v. Potlatch Forests, Inc., supra; Morand Brothers Beverage Co. v. N.L.R.B., supra; International Shoe Co., supra; Pepsi-Cola Bottling Co.* (1947), 72 NLRB 601; *Duluth Bottling Association* (1943), 48 NLRB 1335.

ployer is entitled to discharge, and *keep* discharged, a supervisor who does not aid the management in its legitimate operation of its business. [See dissenting opinion, R. 55-56.]

There just can be no argument of logic, reason, or law to the effect that Cody's activity was "protected concerted activity." The above shows clearly also that the activity and conduct of Cody would not have been protected, whether he had been a supervisor or a rank-and-file employee, and even if supervisors had been included in the "employee" definition.

The Board argues in its decision [R. 46, note 28] that its holding here is consistent with its decision in *United Elastic Corporation* (1949), 84 N. L. R. B. 768, because *if* Cody had not been a supervisor at the time of his activity he would have been under the protection of the statute. The Board and the courts have never handled the question of "protected concerted activity" on such theory. The Board has always looked at the facts as they existed at the time; for example, was there a contract in effect, etc. It has never been assumed by the Board and courts that the activity would have been "protected" had the facts been different. If the rationale of the instant case had been followed in the *United Elastic* case, the Board would have held that the employees should have been reinstated because *if* there had been no contract the activity would have been protected. Although one may not wish, nor is it necessary to our position, to liken Cody's conduct to a strike in breach of contract, the fact remains that his disobedience was just as much "cause" for discharge and refusal to rehire as was the strike in

violation of the contract in the *United Elastic* case. Likewise, Petitioner's right to refuse employment to Cody was not later nullified. That is exactly what the Board held in the *United Elastic* case when it said (pp. 776-777):

> "This right of discharge, like the suspension of the Respondent's obligation to bargain, already existed when the announcement of the termination of the contract was made, so as not to be dependent on the contract's continued existence. Similarly, this right grew out of the *employees'* wrongful action in striking, and, therefore, continued so long as that action remained wrongful and thus *unprotected* concerted activity. And likewise, this action was, in our opinion, as wrongful after the Respondent's announced termination of the contract as before."

So, that case is far from support for the Board's theory in this case.

C. Section 10(c) of the Act Forbids the Board From Ordering Backpay to or the Re-employment of Cody, Who Was Admittedly Discharged "For Cause."

We come now to the discussion of the amendment to Section 10(c) of the Act wherein Congress clearly prohibited the Board from ordering Cody reinstated.[56] Section 10(c) is the part of the statute from which the Board derives its authority to frame a remedy for correction of an unfair labor practice. The Supreme Court

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[56]The following was added to Section 10(c) of the Act in 1947: "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."

in the *Phelps-Dodge* case, *supra,* pointed out that the word "reinstatement" is used in that section because "Reinstatement is the conventional correction for discriminatory discharges" (p. 187). The court further noted that it is, in effect, unrealistic to attempt to ". . . differentiate between discrimination in denying employment and in terminating it . . ." (p. 188), and that the right to restore to a man employment denied him is synonymous with the right to put him back in the job from which he was terminated. It is only to be expected that Congress would use the same word "reinstatement" in the amendment as had been contained in the original statute regarding the remedy for discrimination. It cannot be seriously argued, therefore, that the prohibition contained in Section 10(c) applies only to a case where the Board orders a person placed back in the same or substantially equivalent position from which he was discharged. Such an argument would be unrealistic in its approach and would be a subterfuge by which the will of Congress would be defeated.

Why did Congress put this new sentence in the remedy section of the Act? The answer to that question is clear in the legislative history of this amendment. This limitation on the Board had its origin in the House Bill (H. R. 3020, 80th Cong.), and the purpose of it is discussed in the report of the House Committee on that Bill.[57] On page 42 of the House Report the Committee said that the purpose of this amendment is:

> ". . . to put an end to the belief . . . that engaging in union activities carries with it a license

[57]House of Representatives Report No. 245, 80th Congress, on H. R. 3020.

> to loaf, wander about the plants, *refuse to work,* waste time, break rules, and engage in incivilities and other disorders and misconduct." (Emphasis added.)

The Committee further said there that this provision "will require that the new Board's rulings shall be consistent with what the Supreme Court said . . ." in the *Jones & Laughlin* case, *supra,* and the Committee then quoted a part of that decision including that portion which holds that the Act "does not interfere with the normal right of the employer to select its empolyees . . ." The Congress was not, by this amendment, merely restricting the Board in orders to put a man back on the job from which he was discharged, but it was also saying that if a man has been discharged or suspended "for cause" the employer can *keep* him discharged. Clearly Congress was aiming at such conduct as listed above, including refusal to work, and it intended to strip the Board of the power to order reinstatement *or* re-employment of "any individual" (not restricted to an "employee") who had engaged in *any kind* of misconduct and who had been discharged therefor.[58] The restriction of this sentence is thorough and complete and removed *without qualification* the authority of the Board to order an employer to give work or back pay to "any individual" who has been discharged or suspended "for cause." The Conference Com-

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[58]Whether this restriction would apply in the case of an applicant who had been discharged by a different employer "for cause" is not material to the issue presented here, because Cody had been discharged by Petitioner. That Cody's previous employment record is a matter to be considered by Petitioner was admitted by the Board's counsel in the trial [R. 122].

mittee Report (House of Representatives Report No. 510, 80th Congress) states on page 39 that this specific restriction on the Board ". . . applies with equal force whether or not the acts constituting the cause for discharge were committed in connection with a concerted activity." The Conference Committee reiterated the purposes stated by the House Committee (see p. 55 of House Report No. 510). Senator Taft, co-author of the legislation, stated on the floor of the Senate on June 5, 1947 (93 Cong. Rec. 6600), that *specific* types of conduct which would amount to "cause" were not included because of the "fear that the inclusion of such a provision might have a limited effect . . ." In other words, Congress did not wish to limit "cause" to the type of conduct mentioned in the Board's decision in this case [R. 46]. The Senator said at the same time that there was "a clear intention that these undesirable concerted activities are not to have any protection under the Act . . ." Certainly, before such clear intent on the part of the framers of the legislation can be disregarded there must be something specific in the legislation itself to require it.

Nor can the Board frustrate the intent of Congress by a process of obtuse reasoning by which it comes to the conclusion that the individual was not discharged "for cause" because the conduct would have been protected under a different set of facts. That is what the Board attempts to do here. If Cody's conduct was not "protected" at the time he engaged in it, and even the Board admits that it was not, then the discharge was "for cause." *Any* discharge is either in contravention of the Act or it is not—if it is not a violation of the Act it is "for cause."

Since Cody's discharge was admittedly not in contravention of the Act, it was "for cause." Therefore, since the discharge was "for cause" and the refusal to rehire was for the same "cause," the Act and the decisions under it prohibit the Board from ordering the same employer who discharged him to put him back to work in *any* job, or to pay him back pay.

Conclusion.

The Board's order in this case should not be sustained since it is without legal support and not supported by substantial evidence on the record as a whole, and in view of the following, enforcement of the order would do violence to the provisions and purposes of the law:

1. Supervisors like Cody have no rights whatsoever under the Act;
2. Cody's activity was not within the meaning of Section 7 of the Act;
3. The refusal to rehire Cody did not and could not reasonably be calculated to discourage membership of employees in the Union;
4. Cody was discharged and refused re-employment for cause.

WHEREFORE, Petitioner respectfully urges that the Board's order be set aside in its entirety.

Respectfully submitted,

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